STANLEY HO

v.

LEONG YUET YENG & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. 829 OF 1977]
24 MARCH 1983

CONTRACT: *Action for recovery of debt, loss of exchange rates, interest - Whether debt statute barred - Whether s. 26 (2), Limitation Ordinance applicable - Uncertainty of amount of claim - Lack of consideration.*

The plaintiff, a Hongkong businessman, and Lim Chooi Seng decided to get together in business. Lim was the entrepreneur of Empat Nombor Ekor Berhad. The plaintiff or his wife was supposed to be allotted some shares in the company but the promise was not kept. The plaintiff and Lim had also decided to invest in land in Kuala Lumpur in equal partnership. Each contributed RM420,000 towards the purchase price. Later the plaintiff wished to withdraw from the venture and asked for RM500,000 as a final settlement but at the same time left it to Lim to decide on how much to remit to him. Lim remitted RM420,000, which the plaintiff received on or about 23 July 1970. Eight months later, the plaintiff asked for compensation for loss of exchange rates and for interest. Lim replied, by letter dated 2 April 1971, offering the plaintiff a share of the profits.

Held:

[1] By his letter dated 2 April 1971, Lim intended to compensate the plaintiff by giving him half of the profits out of the sale of the land. The letter could not be construed to mean that the plaintiff was to continue to have a half interest in the profits, if any, to be derived from the sale of the land.

[2] Unless s. 26 (2) of the Limitation Ordinance could be invoked by him, the plaintiff's action was barred by limitation, after about 23 July 1976 i.e. six years after the payment on or about 23 July 1970.

[3] The proviso to s. 26(2) was of no avail to the plaintiff in that the right of action was in respect of an amount (if any) that was uncertain, as Lim had been given the discretion to pay any amount between RM420,000 and RM500,000. An acknowledgement on the part of a debtor must be in respect of a defined or ascertainable amount. (*Good v. Parry* [1963] 2 All ER 59; *Wee Tiang Tay v. Ong Chong Hooi & Anor*. [1978] 2 MLJ 54).

[4] Even otherwise, the letter of 2 April 1971 from Lim could not by any means be said to be an acknowledgement of liability for loss of profits in respect of the shares in Empat Nombor Ekor Berhad.

[5] The promise by Lim to remit to the plaintiff half of the profits from the sale of the land was not backed by the kind of consideration that was necessary for there to be an enforceable contract.

[6] As to the alleged loss in exchange rates, the plaintiff had remitted to him the amount he had required to be sent to him.

[7] There was no legal basis for the claim for interest.

[Claim dismissed.]

Cases referred to:
Good v. Parry [1963] 2 All ER 59
Wee Tiang Tay v. Ong Chong Hooi & Anor. [1978] 2 MLJ 54

Legislation referred to:
Limitation Ordinance 1953, s. 26(2)

For the plaintiff - R. Lazar; M/s. Shearn Delamore & Co.
For the defendants - S.D.K. Peddie; M/s. Skrine & Co.

JUDGMENT

VC George J:

Lim Chooi Seng (Lim) was a successful businessman of Malaysia. Stanley Ho (Ho) apparently is a successful businessman of Hongkong. The two men thought that they should get together in business. Lim was the entrepreneur of what apparently turned out to be a successful venture known as Empat Nombor Ekor Berhad. Lim had promised, if I may use an American vulgarism, "to give a piece of the action" to Ho. I gather the position to have been that Lim had promised to see that Ho or his wife would be allotted some shares in Empat Nombor Ekor Berhad presumably when it went 'public'. the promise was not kept. Lim wrote to Ho saying that he had wanted to but could not keep the promise.

These two men of business had also decided to invest in land in Jalan Pudu, Kuala Lumpur. They were each to put up Malaysian RM420,000 to buy the land. They were to be equal partners. The land appears to have been purchased. Ho appears to have been a somewhat reluctant partner in the land deal. He had thought that he had managed to cry off from his involvement in the land deal but the correspondence between the parties show that, albeit in some bad grace, Ho had accepted the position that he had a half interest in the land deal.

By his letter of 30 June 1970 Lim wrote,

> "with regard to the property invested there is an offer of RM90,000 for the land. If you agree to sell it, then the deal may be negotiated and completed within a month. You will then receive your share of the sale. But if you want your money back then I shall return you the RM420,000. Kindly let me know your decision regarding the matter."

Reading this letter in isolation from later correspondence I see it as an offer in the alternative *viz:* Wait until the sale is completed and you will get your money together with half of the profits; if you are not prepared to wait and want the money that you had invested now, I shall send that amount to you and you will not be entitled to share in any profit that may be derived from the eventual sale of the land.

Ho's reply to that paragraph in Lim's letter of 30 June 1970 was as follows:

> "since you said someone is offering RM90,000 my wife expressed an idea that instead of letting her have half the profits, i.e. RM45,000, you would perhaps in all fairness consider remitting a lump sum of RM500,000 as a final settlement to this long delayed issue. In any case I leave it to your entire discretion to remit whatever amount you deem justified into my account ... by the end of July 1970. It has been my principle that overseas friendship is always more important than money. Please do not feel embarrassed and I shall not revert to it any more in order to avoid any unpleasant feeling."

Ho did not accept either of the said offers made by Lim. In effect he made a counter offer: He thought that Lim should send RM500,000 in full settlement. However, if Lim chose to send less than RM500,000, that would be accepted in full settlement.

Lim may or may not have been embarrassed. What he did was to promptly, on 22 July 1970 pay into the account of Ho in the Banque de L'Indochino HK$824,701.80 which apparently was then the equivalent of RM420,000.

The question that could arise is whether in view his letter of 8 July 1970 Ho was entitled to insist on more than the RM420,000 that Lim had paid into his account. Ho appears to have accepted the payment of RM420,000 since nothing more was heard from him until some eight months later when he decided that after all he would "revert" to the matter and wrote his letter of 4 March 1971.

It is to be noted that in that letter Ho appears to have accepted the position that he was out of the land deal. What that letter reflects is his annoyance at having been let down on the Empat Nombor Ekor Berhad deal. He also gave vent to his frustration in having obtained less Hongkong dollars than he had sent to Lim. He also thought that Lim ought to pay him some interest on his RM420,000. What he wrote was, "Besides, certainly you do not expect me to lose out all the exchange and interest so far accrued on RM420,000 which was made to you as early as 8 November 1968"

In reply Lim wrote his letter of 2 April 1971. His letter can be construed to mean that although he had returned the RM420,000 as far as he was concerned Ho continued to have a half interest in the profits, if any, to be derived from the sale of the land. It could also be construed to mean that he intended to compensate Ho for his alleged loss as a result of the change in exchange rates and in respect of interest on the RM420,000 by giving Ho half of the profits out of the sale of the land.

If it had been Lim's intention that Ho would continue to have a half interest in the land, to my mind it is highly improbable that he would have remitted the RM420,000 to Ho as he did. Accordingly, I am of the view that the construction to be given to that aspect of Lim's letter is the latter of the two said constructions.

Ho by his letter of 14 April 1971 chose to give yet another construction to Lim's letter of 2 April 1971. He construed it as an offer of RM100,000 "in full settlement of the long drawn issue" He went on to write that all he wanted was RM100,000 and was not prepared to wait for the land to be sold. This was an offer by Ho. There is no evidence that the offer was accepted. Lim does not appear to have replied the letter. He did not send any further amounts to Ho. It is not known whether the land was sold. Lim died on 26 June 1976. The writ was caused to be issued on 30 March 1977.

The defendants' stand in respect of Lim's letter of 2 April 1971 is as set out in para. 3(p)(iv): That the promise by Lim to pay half the profit from the sale of the land is unenforceable. Encik Peddie of Counsel for the defendants argued that by the remittance of RM420,000 to Ho, Lim had bought out Ho's half interest in the land and that the promise by the letter of 2 April 1971 to pay Ho half of the profits to be derived from the sale of the land was a promise without consideration and as such unenforceable.

Encik Lazar for the plaintiff argued that when Ho asked for RM500,000 in full settlement but agreed to accept such lesser amount that Lim might decide to remit he must have had in mind an amount between RM465,000 (i.e. RM420,000 plus RM45,000) and RM500,000. Therefore the remittance of RM420,000 could not be said to have extinguished the liability. He submitted that it was an unilateral action in breach of Lim's position as a trustee and in breach of the contract of joint ownership.

In my view the remittance of the RM420,000 was in response to the counter offer by Ho: RM500,000 or such amount which was left to the "entire discretion" of Lim. If Ho was dissatisfied with the exercise of the discretion that he had given to Lim he had a cause of action, the issue being whether Lim had exercised the discretion reasonably and if not what amount should have been sent. This cause arose on receipt by Ho of the RM420,000 which was on or about 23 July 1970 (see AB8).

The writ in this action was caused to be issued only on 30 March 1977. The plaintiff's action would be barred by limitation after about the 23 July 1976 (i.e. after six years) unless s. 26(2) of the Limitation Ordinance could be invoked to do which the plaintiff has to establish that the right of action that he had, was to recover a debt or other liquidated pecuniary claim and that the person liable therefor had acknowledged the claim or had made a payment in respect thereof within six years prior to 30 March 1977.

In my judgment the proviso that is section 26(2), is of no avail to the Plaintiff in that the right of action is in respect of an amount (if any) that is uncertain being an amount that could extend from Nil to RM80,000 (i.e. between RM420,000 and RM500,000 in respect of which Ho had given the discretion to Lim). In *Good v. Parry* [1963] 2 All ER 59 referred to with approval in *Wee Tiang Tay v. Ong Chong Hooi & Anor*. [1978] 2 MLJ 54 it was held that the acknowledgement must be in respect of a defined amount or of an amount that could be ascertained by calculation. It follows that the claim in respect of which the acknowledgement is purported to be made must be in respect of a defined amount or an amount that may be ascertained by calculation which is not the case in the instant matter.

The promise by Lim in his letter of 2 April 1971 to remit to Ho half of the profits from the sale of the land is not backed by the kind of consideration that is necessary for there to be an enforceable contract. It seems to be that the consideration that moved Lim to make the promise was the griping letter of Ho (of 4 March 1971) and perhaps a feeling that morally he had a obligation to compensate Ho for the losses he had taken as a result of fluctuations in the exchange rates, the loss of use of the RM420,000 for the reason that it was with Lim and for not keeping his promise to give the Ho's shares in Empat Nombor Ekor Berhad.

As far as the claim based on the Empat Nombor Ekor Berhad shares is concerned there is no actionable claim. At best there was some sort of moral obligation on the part of Lim to try to provide Ho or his wife with some of the shares. Such an obligation does not give rise to a cause of action. In any event the claim is barred by limitation. Even assuming for a moment that an acknowledgement of the obligation to pay loss of profits can start time running afresh from the date of the acknowledgement, there is no help for the plaintiff in that the letter of 2 April 1971 from Lim cannot by any means be said to be an acknowledgement of the liability for loss of profits in respect of the shares in Empat Nombor Ekor Berhad.

As to the alleged loss in exchange rates, Lim has provided the answer in his letter of 2nd April 1971. He had received RM420,000 and he had remitted RM420,000. Exchange rates do fluctuate. Ho wanted RM420,000 sent to him and that was done.

As to the claim for interest, there is no legal basis for such a claim. There was no agreement to pay interest on the RM420,000.

If it is asked as a method of computing damages for the loss of use of the RM420,000 while it was in Lim's hands, it is my view that such a claim cannot rise on the facts. Ho had invested RM420,000 on the land deal in 1968. Then came 13 May 1969. The correspondence

suggests that Ho was anxious to try and get at least his RM420,000 back. Unlike Lim, Ho appears to have lost confidence in the economic future of Malaysia. He does not appear to have been particularly impressed with Lim's assurance that they could sell the land at a profit. When given the opportunity he grabbed the alternative offer by Lim to remit the RM420,000. All the griping that he has indulged in, as to all the things he could have done with that money, are of no avail to him. I have no doubt that he had never hoped to see that RM420,000 again and when he received it he must have been pleasantly surprised. Eight months later he must have come to realise that things were picking up in Malaysia. His letter of 4 March 1971 was, I think, a "try on" that almost worked. If he had taken Lim at his word and waited for the land to be sold Lim might have paid his half of the profits. But Ho would not accept that offer by Lim. He wanted RM100,000 straightaway. It is not surprising that Lim simply ignored Ho.

The claim was dismissed with costs.

Also found at [1983] 2 CLJ 270